No. 86-1295

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ASHLAND OIL, INC.,

Appellant,

v.

HERSCHEL H. ROSE, III,
Tax Commissioner
of the State of West Virginia,

Appellee.

On Appeal from the Supreme Court of Appeals of West Virginia

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether questions of civil retroactivity are governed by the standard enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

2. Whether the rules announced in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied prospectively.

3. Whether the decision below is a final judgment within the meaning of 28 U.S.C. § 1257(2).

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**On Appeal From The
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MOTION TO DISMISS OR AFFIRM

This appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgement of the Supreme Court of Appeals of West Virginia on the grounds that this appeal does not present a substantial federal question and that the judgement below rests on an adequate nonfederal basis as well as other grounds which this appellee will present herein, all of which establish that the Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Justice Brotherton of the Supreme Court of Appeals of West Virginia is reported as *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986). A copy of the opinion below is set out in full in the Appendix, attached to appellant's Jurisdictional Statement [JS].

The order of the Circuit Court of Kanawha County granting the appellant summary judgment dated February 25, 1985, and the administrative decision of the Tax Commissioner of the State of West Virginia dated April 21, 1981, are set out in full in the Appendix attached to the appellant's Jurisdictional Statement.

JURISDICTION

Ashland Oil, Inc. seeks to appeal a decision of the Supreme Court of Appeals of West Virginia reversing the Circuit Court of Kanawha County, West Virginia, which applied this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), on a prospective basis from June 12, 1984. Appellant invokes the jurisdiction of this Court under 28 U.S.C. § 1257(2) (1982), "[b]ecause a decision of the West Virginia Supreme Court upholds a state statute against a challenge under the United States Constitution." Appellant's Jurisdictional Statement at 2. There is here, however, no constitutional challenge.

The Court below agreed with the appellant that the taxing scheme at issue was unconstitutional as violative of the Commerce Clause and that it was invalidated by *Armco*. The only issue presented to this Court is whether prospective application of *Armco* is

proper under the circumstances. As such, appellant's assertion of jurisdiction is invalid.

This Court has repeatedly recognized that questions of retroactivity are not constitutional in nature. *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932) *U.S. v. Johnson*, 457 U.S. 537 (1982). For the purposes of this appeal, no issue remains where a state statute has been "drawn in question." The lower court did not uphold a state statute in the face of a constitutional challenge, and this appeal is not within the jurisdiction of 28 U.S.C. § 1257(2). Accordingly, this appeal should be dismissed.

STATEMENT OF THE CASE

Ashland Oil, Inc. is an Ohio Corporation, (hereinafter sometimes referred to as "Taxpayer" or "Ashland"), qualified to hold property and do business as a foreign corporation in the State of West Virginia. During the period in question, Ashland carried on extensive business activities in West Virginia. As a result of such activities, Hershel H. Rose III, then Tax Commissioner of the State of West Virginia, predecessor in office to the appellee herein, Michael E. Caryl, (hereinafter sometimes referred to as "the Appellee" or "the Commissioner"), issued a notice and assessment of tax against appellant, Ashland for business and occupation tax for the fiscal years ending September 30, 1975 and September 30, 1976, for tax in the amount of $181,313.22, with penalty added in the amount of $34,141.67, for a total assessed tax and penalty of $215,454.89.

Administrative hearings were held on several days in 1978. By Administrative Decision dated April 21, 1981, Commissioner Rose determined that the Tax-

payer was indebted to the State of West Virginia for tax in the revised amount of $183,933.74. On May 26, 1981, the Commissioner was served with the Notice of Appeal by which the Taxpayer sought review of the administrative decision by the Circuit Court of Kanawha County, West Virginia. By agreement, the parties submitted briefs to the Circuit Court in support of their respective positions. Following oral argument on August 27, 1982, the case was submitted for decision.

Two years later, in October 1984, subsequent to the *Armco* decision, Taxpayer moved for summary judgment based on the discrimination rulings in *Armco*. After hearing held January 21, 1985, and after denying the Commissioner's request to file a supplemental brief on the impact of the *Armco* decision, the Circuit Court granted the summary judgment motion, thereby annulling the assessment.

Prior to June 12, 1984, the date of issuance this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), the issues presented to the Circuit Court, and prior to that at the administrative level, revolved solely around whether certain of Ashland's business activities within West Virginia constituted sufficient nexus such that the business and occupation tax could be constitutionally levied on its wholesale sales to West Virginia customers. The *Armco* case involved nexus issues which are highly significant and relevant to the case at bar, and which were addressed and argued before this Court. Such issues were not reached because this Court determined that the taxing scheme was facially discriminatory. At the Circuit Court level, the parties herein had considered the

resolution of these nexus issues to be key to resolution of the Ashland assessment.

The West Virginia Supreme Court of Appeals, by decision dated November 12, 1986, reversed the order of the Circuit Court, and applied the *Armco* decision prospectively from June 12, 1984, holding that "the reliance of the State of West Virginia on a presumably valid tax outweighs any injury that may be sustained by Ashland on account of our holding of prospectivity." The Court also remanded the remaining nexus issues herein back to the Circuit Court for further proceedings.

ARGUMENT

I. THE WEST VIRGINIA SUPREME COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARDS FOR PROSPECTIVE APPLICATION OF NEW RULES IN CIVIL CASES.

A. THIS COURT PREVIOUSLY HAD THE OPPORTUNITY TO DECIDE THE QUESTION OF PROSPECTIVITY AND DECLINED TO DO SO.

This case comes before the Court as an appeal from the ruling of the West Virginia Supreme Court of Appeals holding that this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) be applied on a prospective basis from the date of that decision, June 12, 1984. The Court below found that the assessment against the Taxpayer came within this Court's holding in *Armco*, but, employing the analysis enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), found that prospective application was proper.

The West Virginia Court was presented with the prospectivity issue as a result of this Court's October 9, 1984 denial of the Commissioner's Petition for Re-

hearing filed subsequent to *Armco*. The Petition for Rehearing had initially raised the issue of prospective application. Relying on *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984), the West Virginia Court properly interpreted that resolution of the prospectivity question had been referred to it by this Court. *Bacchus*, decided on June 29, 1984, two weeks after *Armco*, held that the issues of remedies or refunds when a state tax is found unconstitutional, are frequently interwined with state law and are better resolved at the state level. This position was subsequently reaffirmed in *Hooper v. Bernalillo County Assessor*, 472 U.S. ___, 105 S. Ct. 2862, 2869 (1985), and again in *Williams v. Vermont*, ___U.S. ___105 S. Ct. 2465 (1985).

B. THE GOVERNING STANDARD FOR QUESTIONS OF PROSPECTIVITY IS THAT ENUNCIATED IN *CHEVRON OIL CO. V. HUSON*.

The Taxpayer's initial attack on the decision below is that the West Virginia Court employed the wrong analysis as to civil prospectivity. This Court has explicitly stated that all questions of civil retroactivity are governed by *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Taxpayer asserts on the other hand that the correct rule is the common law rule articulated by Chief Justice Marshall in *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801). That is, that a newly announced rule of law be applied to both civil and criminal cases pending on direct review. Ashland took a contrary position below. Before the West Virginia Court, the Taxpayer cited the *Chevron* standards as the proper test in determining whether retroactivity was appropriate, and did not cite *The Schooner*

Peggy, supra. Brief of Appellee, Ashland Oil v. Rose, 350 S.E.2d at 531 (W. Va. 1986).

The taxpayer's assertion that civil as well as criminal cases on direct appeal are subject to newly announced rules of law is clearly erroneous. This Court has expressly recognized different standards for civil and criminal retroactivity. The schism in the standard for applying new rules of law governing the conduct of criminal prosecutions to cases on direct appeal began with *Linkletter v. Walker,* 381 U.S. 618 (1965), and, was expressly recognized by this Court in *U.S. v. Johnson,* 437 U.S. 537 (1982). After an extensive review of the use of retroactive application in criminal cases, *Johnson* held that criminal procedure decisions based on the Fourth Amendment are to apply retroactively to convictions not final at the time of the decision. At the conclusion of the decision, Justice Blackmun expressly stated that *Johnson* had no impact on civil cases by explaining: "Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in *'Chevron Oil Co. vs. Huson'*," 437 U.S. at 563.

This distinction between civil and criminal prospectivity was reinforced in *Griffin v. Kentucky,* 55 U.S.L.W. 4089 (January 13, 1987) which held that new rules of criminal procedure apply to all state or federal *criminal* cases pending on direct review with no "clear break" exception. In *Griffin,* Mr. Justice Blackmun again specified that *Chevron* enunciated the governing standard in all civil cases. "We noted in *Johnson* that our review did not address the area of civil retroactivity. *See* 447 U.S. at 563. That area continues to be governed by the standard enunciated in *Chevron Oil Co. v. Huson* . . ." n.8, *Id.* at 4091.

The taxpayer gratutiously relies on the reasoning in *Griffin* to mount the present challenge to the West Virginia Supreme Court's use of the *Chevron* standard. The West Virginia Court has anticipated this contention, and answered Ashland's reliance on the criminal rule as follows:

> Also, we do not consider the application of prospectivity in criminal rights cases such as *People v. Boyd*, 38 Cal. 3d 762, 215 Cal. Rptr. 1, 700 P.2d 782 (1985), dispositive in a civil setting. Where a decision of unconstitutionality affects the life or liberty of a convicted criminal, the Supreme Court has extended the rules of prospective operation to include pending cases, while limiting retroactivity in order not to disturb final judgments. Such considerations are not present in civil cases, and a strict rule of prospectivity may therefore be applied.

350 S.E.2d at 536 n.10.

The reasoning behind the civil/criminal distinction recognized by this Court and by the lower Court is clear. Criminal prosecutions present questions "of life and liberty" to the defendant.

It is because of such considerations that prospectivity rules have been adjusted according to the nature of the new constitutional rule. For example, where constitutional guarantees such as that against double jeopardy are involved, the rule mandates that the trial court lacks authority to try the Defendant at all, *Ashe v. Swenson*, 397 U.S. 436 (1970). These policy considerations mandating retroactive application where the new rule of criminal procedure to be applied restricts the jurisdiction of the trial court.

Conversely, a decision resulting in a more expansive interpretation of the substantive basis of criminality would require only prospective application. Such factors are not present in civil cases.

Further undercutting Ashland's argument is the fundamental difference between the operation of civil and criminal retroactivity rules as recognized in *U.S. v. Johnson, supra.* Prior to *Griffin,* when a new rule of criminal procedure was found to be a "clear break" with the previous law, a holding of nonretroactivity almost invariably resulted. Conversely, in the civil context, the "clear break" principle is merely the first part of the three-prong *Chevron* test, and is only the threshold prerequisite for consideration of civil prospectivity. Under *Chevron* analysis, the history, purpose and effect of the new rule, as well as the inequity that would be imposed by its retroactive application, remain to be examined. See *U.S. v. Johnson,* n.12, 457 U.S. at 550.

The reliance factors which form the basis for nonretroactivity in civil cases, in the first instance, form a further basis for the distinction between criminal and civil prospectivity. As noted commentator has observed:

> [Decisions applied prospectively] have a common objective, to rid the law of an unsound rule and at the same time preclude undue hardship to a party that has justifiably relied on it. Reliance plays its heaviest role in such areas as property, contracts, and taxation, where lawyers advise clients extensively in their planning on the basis of existing precedents. Traynor, *Quo Vadis, Prospective*

Overruling: A Question of Judicial Responsibility, 28 Hastings L.J. 533, (1977).

350 S.E.2d 535 n.7.

Criminal cases simply do not present the same questions of reliance and resulting hardship to the prosecutorial authorities as civil cases do to both parties.

Ashland's argument overlooks perhaps the most fundamental distinction between criminal and civil retroactivity. In criminal cases, even in the wake of *Griffin*, all rules of criminal procedure announced are subject to application to only pending cases on direct appeal regardless of whether the rule constitutes a "sharp break" with prior law. In civil retroactivity, in contrast, decisions ordinarily operate on a fully retroactive basis. Only where a newly announced rule can meet the *Chevron* threshold test will nonretroactive application even be considered.

Ashland's contention that the area of civil retroactivity is a developing "quagmire" is completely without merit. The principal support for this unfounded assertion is a pre-*Chevron* case, *U.S. v. Donnelly*, 397 U.S. 286. The Court has made quite clear the standard to applied in civil cases, and such rules are sound and grounded in logic.

II. THE *CHEVRON* TESTS FOR PROSPECTIVE APPLICATION ARE SATISFIED HERE.

In *Armco*, the statutory scheme employed by West Virginia was declared facially discriminatory in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3. The Tax Commissioner of the State of West Virginia submits respectfully that the rules of law announced in the *Armco* decision, *supra*, were correctly applied on a prospective basis from June 12, 1984.

The Federal Constitution has no voice on the subject of prospective or retroactive application, *United States v. Johnson*, 457 U.S. 537, 542 (1982), but the decisions of this Court have established criteria to determine whether or not a civil decision should be applied prospectively. Appellee submits that the *Armco* decision clearly fulfills each and every one of the *Chevron* criteria for prospective application.

As established in the first section of this motion, the recognized standards governing prospective application of judicial decisions in civil cases were set forth in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971). This Court recognized the standards as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, * * * 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation.' * * * Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citations omitted].

404 U.S. at 106-107.

Under this three-step test, the *Armco* decision clearly should be prospectively applied.

The first stage of the three-prong *Chevron* test, is a threshold standard which questions whether the decision to be applied establishes a new principle of law. *Armco* certainly did so. This Court was presented with the issue of whether West Virginia's wholesale gross receipts tax was unconstitutionally discriminatory in *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). The tax was expressly sustained by the dismissal of the appeal for lack of a substantial federal question. This amounts to a ruling on the merits. See *Hicks v. Miranda*, 422 U.S. 332 (1975).

The Court in *Armco* overruled the clear past precident of *Columbia Gas*, explaining in footnote 7:

> We acknowledge our recent dismissal for want of a substantial federal question of a case raising, inter alia, a nearly identical challenge to the West Virginia gross receipts tax. *Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). We may find it necessary not to follow such a precedent when the issue is given plenary consideration. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

Armco Inc. v. Hardesty, 467 U.S. 638 at n.7.

In addition to overruling a decision less than two years old, *Armco* established two "new rules" which make it a decision of national significance in the area of state taxation. First, citing *Maryland v. Louisiana*,

451 U.S. 725 (1981), this Court found that the gross privilege tax on manufacturing at the rate of .88% was not a compensatory tax; that is one imposed to offset the exemption of intrastate wholesaler/manufacturers from payment of the lower .27% gross tax rate on the privilege of making wholesale sales in West Virginia of products which they manufacturer in West Virginia and sell there at wholesale. Second, the principle of "internal consistency," previously a net income apportionment test applied in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), was employed as a discrimination test for the first time.

These two "new rules" first announced in *Armco*, represented a sharp break from prior law. The Armco opinion significantly restricted the doctrine of compensatory taxes with regard to the scope of examination of a state's tax treatment of goods and materials to be consumed within a state. The disapproval of *Caskey Baking Co. v. Virginia*, 313 U.S. 177 (1941), in footnote 7 of *Armco*, signalled a restriction of the Court's analysis in determining whether a tax is compensatory in nature from a comprehensive examination of a state's entire scheme of taxation to a much narrower review of a state's taxation of "substantially equivalent events." Under this narrower review, a taxpayer's wholesale sales of manufactured products and its manufacturing of such products are not "substantially equivalent events." Therefore, the Court held that the .88% rate on manufacturing was not compensatory for the lower .27% levy then on wholesale sales.

Likewise, there was no prior indication that the "internal consistency" requirement, under which the

Court must hypothesize that another state has adopted a tax identical to the tax in question, which was previously applied only to apportionment formulas used in net income taxes, would be grafted onto the discrimination test and applied to privilege taxes measured by gross receipts. In view of these two "new rules" and the Court's reversal of *Columbia Gas Transmission Co. v. Rose, supra,* the *Chevron* threshold test is satisfied.

That these are "new rules" is vividly demonstrated by the flurry of scholarly commentary they have generated. See, e.g., Lathrop, *Armco - A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause,* 63 Taxes 551 (August 1985); Judson and Duffy, *An Opportunity Missed: Armco, Inc. v. Hardesty, A Retreat from Economic Reality in Analysis of State Taxes,* 87 W. Va. L. Rev. 723 (1985); Lightburn & McAuthur, *U.S. Supreme Court Ignores Unitary Issues in Armco, Inc. Opting for Discriminatory Finding,* 3 J. of State Taxation 211 (1984); *Note, A Call for Internal Consistency Among State Taxing Schemes: Armco, Inc. v. Hardesty,* 38 Tax Lawyer 519 (1985).

These articles have focused on the two "new rules" announced in the *Armco* opinion as well as the unitary rule/nexus issue which this Court did not reach in *Armco.* Special emphasis is placed on the impact of the "internal consistency" rule. These commentators predicted, as did the lower Court, that *Armco* signalled a return to the semantics-oriented, formalistic approach rejected by this Court in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977). See *Judson and Duffy, supra,* at 741. Although the Commissioner is not seeking reconsideration here, clearly, the hold-

ing in *Armco, supra,* was not foreshadowed, and the "substantially equivalent event" and "internal consistency" tests as modified by *Armco* should be recognized as "new rules."

Ashland attacks the sufficiency of these "new rules" on the basis that there was no break with clear past precedent. Such arguments have a hollow ring. The taxpayer's position relies principally on *Columbia Steel Co. v. Washington,* 30 Wash. 2d 658, 1982 P.2d 976 (1948), and on the dissenting opinion in *General Motors v. Washington,* 377 U.S. 439 (1964). These older holdings can hardly be considered clear foreshadowing of such a change in the law. Ashland feigns astonishment at the lower court's reliance on the *Columbia Gas,* ignoring the fact that, at the time of that decision, there had been no successful challenge to West Virginia's tax scheme for 49 years. Certainly West Virginia could reasonably rely on this dismissal on the merits and, just as certainly, such a dismissal is entitled to the same respect by state courts as is a decision following the Court's plenary consideration. *Hicks v. Miranda,* at 344.

Taxpayer's reliance on *Columbia Steel, supra,* is thoroughly misplaced. *Columbia Steel* did involve an exemption in the State of Washington's privilege tax system which was virtually identical to the exemption in *Armco,* and that exemption was found to discriminate against interstate commerce. However, the Washington Supreme Court in that case did not attempt to analyze the issue in terms of the actual effect of the exemption or consider the exemption in conjunction with that State's other tax provisions. The Washington Court clearly invalidated the tax on

purely semantic grounds without consideration of the practical economic realities involved, and the Washington court later recognized as much in *B. F. Goodrich v. State*, 38 Wash. 2d 663, 231 P.2d 325 (1951).

Ashland also maintains that internal consistency is not an unforseen new rule of law but is, rather, only a new label on existing law. This contention is based on certain language in *Gwen White & Prince v. Henneford*, 305 U.S. 434 (1939).

The issue in that case was whether Washington State's "business activities" tax created an unconstitutional burden on interstate commerce. The Court held that it did. The opinion, like *Columbia Steel, supra*, is based on the formalistic, semantics-oriented approach rejected by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). *Compare Standard Pressed Steel v. Department of Revenue of Washington*, 419 U.S. 560 (1975).

Prior to *Armco*, the question of whether a state taxing scheme was discriminatory in nature turned on the ability of the taxpayer to demonstrate actual "dollars and cents" discrimination. See *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963). That is, the tax was to have been examined for its practical effect, *Maryland v. Louisiana*, 451 U.S. 725 (1981). The internal consistency rule requires no such showing. The language relied on by Ashland from *Gwen, White & Price* was in no manner the rule in effect at the time of *Armco*.

One need look no further than the dissent in *Armco* to find a rebuttal to Ashland's contention:

> The Court also justifies its decision on the ground that if Ohio, or any state where ap-

> pellant may manufacture products sold in West Virginia, imposed a manufacturing tax, appellant might possibly pay more taxes on its goods sold in West Virginia than a local manufacturer. But, appellant has not demonstrated that it in fact pays a higher tax burden in West Virginia solely by reason of interstate commerce. The court sidesteps that fact, however, by borrowing a concept employed in our net income tax cases. Under that line of cases, a state tax must have an internal consistency that takes into consideration the impact on interstate commerce if other jurisdictions employed the same tax. See *Container Corp. of America v. Franchises Tax Board*, 463 U.S. 159 (1983). It is perfectly proper to examine a state's net income tax system for hypothetical burdens on interstate commerce. Nevertheless, that form of analysis is irrelevant to examining the validity of a gross receipts tax system based on manufacturing or wholesale transactions. Where a state's taxes are linked exactly to the activities taxed, it should be unnecessary to examine a hypothetical taxing scheme to see if interstate commerce would be unduly burdened. [Citations omitted].

467 U.S. at ___, 105 S. Ct. 2626 (Rehnquist, J. diss.)

Subsequent to *Armco*, it is no longer necessary for a taxpayer to show actual discrimination to maintain a successful Commerce Clause claim, as previously required. The "actual dollars and cents" standard of *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963)

was abandoned. Clearly, therefore, the threshold *Chevron* test has been satisfied.

The second prong of the *Chevron* test requires inquiry into the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will retard this operation." Retrospective application of *Armco, supra,* will not further the purpose or operation of the Commerce Clause, which is to create an area of free trade among the several states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 327 (1977). There is no likelihood that refunding taxes collected, or, as is the case here, annulling an assessment for fiscal years 1975 and 1976, would have any such remedial effect. There is no indication in the record that there has been any hindrance of free trade. Retroactive application of the "new rules" will simply not effectuate the Commerce Clause goals which the Court sought to achieve in *Armco* to any greater extent than will prospective application. To apply Armco retroactively rather than prospectively would serve only to deplete the State of West Virginia's treasury and would not result in freer trade among the state.

Ashland, of course, takes the position that prospective application is detrimental to the operation of the Commerce Clause, and states that the purpose of the Commerce Clause is to prevent collection of unconstitutional taxes. The historical purpose of the Commerce Clause is, however, to prevent the imposition of trade barriers among the states, and to promote an interstate free trade zone. This purpose is accomplished by constitutionally barring the states from regulating interstate commerce, and charging Congress with this duty and authority. Taxation of

interstate commerce in violation of constitutional limitations is a form of regulation of interstate commerce by the states. Thus, the true "purpose and effect" of this provision is to promote free trade among the states, not merely to bar tax collections.

The final inquiry under *Chevron* is a balancing test, requiring comparison of the hardship or injustice created by a retroactive application against that of prospective application of the new rule of law.

Applying *Armco, supra,* retroactively will not serve the ends of justice and will impose substantial hardship on the State of West Virginia and her taxpayers. The West Virginia gross receipts tax is of long standing. This taxing scheme had been in operation since 1933, remaining substantially the same for fifty years prior to the this Court's decision in *Armco*. The burden of retroactive application of Armco to West Virginia and her resident taxpayers would be brutally heavy, as it would result in revenue loss of approximately Fifty Million Dollars. The State of West Virginia is constitutionally required to maintain a balanced budget and has relied upon the availability of these monies in planning future fiscal policy and formulating budget allocations. Thus, actual fiscal hardships and effects would result from retroactive application of the *Armco* rules without any substantial Commerce Clause benefit.

The payment of these refunds would have a much greater economic impact on the State of West Virginia would than the loss of a windfall refund to the individual manufacturer-wholesalers and their stockholders who stand to benefit from a retroactive application. Obviously, the State would suffer more harm than any single taxpayer could benefit.

It is important to note that, prior to the Armco decision, Ashland did not argue that the wholesale gross receipts tax was discriminatory. *Armco* was certainly recognized by both parties as being significant to the outcome of this proceeding, but solely because of the important nexus questions at issue which this Court ultimately found unnecessary to address. The briefs filed before the Circuit Court of Kanawha County dealt exclusively with the nexus issues. Ashland raised no objection to the assessment based on discriminatory treatment prior to June 12, 1984, the day of the issuance of the Armco decision. As the West Virginia Court expressly recognized, "although Ashland asserts that it raised the Commerce Clause argument from the beginning, it is clear from the record that the real dispute in this case has been nexus." 350 S.E.2d at 537 JS 11A.

In the face of this massive depletion of the public treasury coupled with the reliance the taxpayers and this State have placed on a fifty-year-old statute, the harm to the State of West Virginia, should Armco be applied retroactively, unquestionably outweighs any harm resulting from the loss of lessened tax burdens to Ashland and similarily situated taxpayers, for past years.

This Court has consistently applied decisions prospectively in civil cases involving the public treasurys of state and local governments.

In *Cipriano v. Houma*, 395 U.S. 701, 23 L. Ed. 2d 647, 89 S. Ct. 1897 (1969), a Louisiana law which provided that municipal bonds could be issued only if approved by a majority of "property taxpayers" was struck down because it was in violation of the equal protection clause of the Fourteenth Amendment. The

decision in *Cipriano* was not applied retroactively, so it did not apply to bonds where authorization for issuance had been completed prior to the date of the decision.

In *Lemon v. Kurtzman*, 411 U.S. 192, 36 L. Ed. 2d 151 93 S. Ct. 1463 (1973) (hereinafter "*Lemon II*"), the question was whether to apply the decision in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) (hereinafter "*Lemon I*"), prospectively. *Lemon I* struck down, on First Amendment grounds, a Pennsylvania law which provided for reimbursement of nonpublic sectarian schools for certain educational services as violative of the First Amendment. At stake were twenty-four Million Dollars the schools were to be paid prior to the decision in *Lemon I*. The decision was applied prospectively in *Lemon II* and the schools receive payment:

> 'In short, the propriety of the relief afforded appellants by the District Court, applying familiar equitable principles, must be measured against the totality of circum stances and in light of the general principle that, *absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful.*'

[411 U.S. at 208-209, 93 S. Ct. at 1473, 36 L. Ed. 2d at 166.] [Emphasis supplied].

Here, as in *Lemon II*, to compel a state official, the Tax Commissioner, to anticipate a judicial ruling of which he had no inkling until *Armco, supra*, "elevates judicial fiat at the expense of basic principles

of fairness and common sense." See *Ables v. Mooney*, 164 W. Va. 19 (1979) *264 S.E.2d 424, 432.* Indeed, the major distinction between *Ables* and the instant case is the vastly greater amount of public funds at stake in the case at bar.

Likewise, a New Jersey case, *Salorio v. Glaser*, 461 A.2d 1100 (N.J. 1983), closely resembles this one. That case struck down New Jersey's emergency transportation tax because it violated the Privileges and Immunities Clause of the Constitution.

Relying on *Lemon II, supra,* the Court applied the decision prospectively, stating:

> The legislative and executive branches of government have relied on the ETT for many years in preparation of budgets, with respect to both income and expenditures, and in making appropriations and expenditures. The expenditures cannot be undone and reimbursements would have a substantial effect on the State's existing financial requirement. Public fiscal stability is at issue.
>
> Furthermore, no one challenged the ETT until June 1977, fifteen years after the ETT was enacted. * * * It is of considerable moment that the plaintiffs have suffered no financial harm because they have received a credit of the amount paid to New Jersey against their New York income tax. Under these circumstances we believe that reimbursement is not warranted.

461 A.2d 1109-1110.

The aggrieved party subsequently sought review of the decision, but it was denied. *Salorio v. Glaser,*

supra, cert. denied sub nom. Glaser v. Salorio, 464, U.S. 993 (1983).

The reasoning on which these courts relied is equally applicable to the case at bar. All these cases involve new rules or an unforeseen overruling decision in civil cases in which public treasuries of state and local governments are at risk. Where state officials, in good faith performance of their official duties, rely on presumptively valid statutes which are unexpectedly overturned, prospective application is appropriate.

III. THE DECISION BELOW IS NOT RIPE FOR REVIEW BECAUSE IT IS NOT A FINAL JUDGMENT.

The Circuit Court of Kanawha County, granted Ashland's Motion for Summary Judgment based on *Armco*, and, therefore, never addressed Ashland's original argument based on nexus that the business and occupation tax violated the Commerce and Due Process Clauses of the United States Constitution as certain of their operations lacked the requisite nexus. When the West Virginia Supreme Court of Appeals reversed the trial court, it too declined to address the nexus issues remaning the case to the trial court. Obviously, there remain unresolved Federal constitutional questions which may eventually be presented to this Court. It is therefore clear that reviewing this matter on appeal at this point in time is premature and will require piecemeal litigation of Ashland's various theories, any of which could be outcome-determinative.

Taxpayer seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(2), which provides for review of "final judgments or decrees" only. The opinion

below does not satisfy traditional definitions of finality because it does not "terminate the litigation," as required by *Mower v. Fletcher*, 114 U.S. 127, 128, (1885). "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review." *Collins v. Miller*, 252 U.S. 364, 371.

Most importantly, the decision below expressly leaves potentially dispositive federal constitutional questions for continued litigation. This Court has held that the mere potential that additional federal questions may arise subsequent to a state court's remand, precludes review:

> This potentiality of additional federal questions arising out of the same controversy has led this Court to find want of the necessary finality of adjudicated constitutional issues in condemnation decrees before valuation has been made. Like considerations are relevant here.

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 72, 92 L. Ed. 1212, 68 S. Ct. 972 (1948).

In their Jurisdictional Statement, at pp. 5-8, Ashland at tempts to fit the opinion below into one of the expanded concepts of finality expounded in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975). Ashland fails to mention that the threshold requirement of *Cox*, that no substantial federal questions remain unresolved, is unmet in this case. In *Cox*, this Court identified four categories of cases which would be considered final in spite of unresolved proceedings still pending:

> In most, if not all, of the cases in these categories, these additional proceedings would

> not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' [citation omitted], as well as precipitate interference with state litigation. * * *

420 U.S. at 477-478.

The instant Jurisdictional Statement at page 7, implies that Ashland has no chance of prevailing in the West Virginia Courts on the nexus issues and that this Court will have a later opportunity to address the issues for which review is presently sought, which will insure that Petitioners get their "day in court." Nothing in the policies of finality embodied in *Cox* or its predecessors allows Petitioners two days in Court. To so allow would unnecessarily congest this Court's docket, needlessly interfere with orderly State proceedings, and, should Respondents prevail, delay the ultimate resolution of the controversy below.

Ashland also maintains that finality is satisfied under the *Cox* category for review of cases in which there is risk of erosion of federal policy. This doctrine has been expressly limited, however. *See Flynt v. Ohio*, 451 U.S. 619 (1981). The reasoning suggested by the Ashland would expand the construction of this category far beyond that originally intended. Especially where, as here, the resolution of the prospectivity issue can await review without adverse effect while the remaining constitutional questions are resolved. The *Cox* categories are not to be allowed to "swallow the rule" of finality.

CONCLUSION

Counsel for the appellee, Michael E. Caryl, West Virginia State Tax Commissioner, respectfully submits that jurisdiction does not lie here under 28 U.S.C. 1257(2); that the decision below is not ripe for review; that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate nonfederal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

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